

**COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE**

**PARAGON RESIDENTIAL PROPERTIES, LLC**

v.

**BROOKLINE ZONING BOARD OF APPEALS**

No. 04-16

**DECISION OF THE COMMITTEE  
ON REMAND**

May 12, 2008



oral argument to the Presiding Officer,<sup>1</sup> the Presiding Officer issued a “Proposed Decision and Report of Hearing Officer” on January 23, 2007,<sup>2</sup> in accordance with 760 CMR 56.06(7)(e)(9) and (10) (2008)<sup>3</sup> and G.L. c. 30A, § 11(7). In the cover letter for the Proposed Decision, addressed to counsel for all parties, the Presiding Officer stated:

Enclosed please find the Proposed Decision and Report of Hearing Officer in the above case. In accordance with 760 CMR 30.09(5)(i) [now 760 CMR 56.06(7)(e)(10)],<sup>4</sup> you may file written arguments and objections on or before February 5, 2007 for the Committee’s consideration.

See attached Exhibit A. On February 5, 2007, the Board filed its “Objections and Argument in Opposition to the Draft Decision of the Committee’s Hearing Officer.” See cover letter of Board’s counsel attached as Exhibit B. The Intervener submitted a letter of objection and argument regarding the proposed decision on the same date. The Appellant did not submit any objections or arguments.

With regard to the participating Committee members, although we did not hear or read all the evidence, the Committee members reviewed some of the evidence, as well as the Board’s Objections and Argument, the Intervener’s letter and the parties’ post-hearing

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1. One Committee member, who left the Committee following the issuance of the Decision on March 26, 2007, attended part of the first day of hearing on April 3, 2006. The parties chose not to submit oral argument to the Presiding Officer. Tr. IX, 73.
  2. The date stated on the Proposed Decision (February 23, 2007) is erroneous. The Proposed Decision was issued on January 23, 2007, with a cover letter correctly dated January 23, 2007.
  3. At the time of the Committee’s decision on Paragon’s appeal, 760 CMR 30.00 (2004) and 760 CMR 31.00 (2004) were the applicable Committee regulations in effect pursuant to G.L. c. 40B. Effective February 22, 2008, the Department of Housing and Community Development promulgated a revised regulation, 760 CMR 56.00. Under the transition rules in § 56.08(3)(c), for the most part, the current regulation is applicable to this proceeding. Where applicable, we note the corresponding provisions of the former regulations for convenience. There are no material differences between the former regulations and the current one in effect, with regard to the issues in this Decision on Remand.
  4. The citation properly should have been to to 760 CMR 30.09(5)(h) as well, which provides: “If a majority of the committee have neither heard nor read the evidence, the presiding officer shall comply with M.G.L. c. 30A, § 11(7).” Section 30.09(5)(h) is now at 760 CMR 56.06(7)(e)(9).

memoranda. The Presiding Officer also fully participated in our deliberations.<sup>5</sup> On March 26, 2007, the Committee issued its final Decision.

The Board appealed the Committee's decision to the Superior Court and filed a motion to remand the matter to the Committee on the basis that it was denied an opportunity to present an oral argument to a majority of the members of the Committee after the conclusion of the hearing. The Superior Court remanded the matter to the Committee, ruling that:

There was an absolute right to an oral argument before the presiding officer 760 CMR 30.09(6) [now 760 CMR 56.06(7)(f)] but the right to an oral hearing before the committee is limited. If a majority of the HAC have not either heard or read the evidence, the parties shall have a right to either oral or written argument as directed by the HAC pursuant to G.L. c. 30A, § 11(7) and 760 CMR 30.09(5)(h) [now 760 CMR 56.06(7)(e)(9)]. It is not apparent from the record provided to this court whether or not the HAC reviewed the evidence at the hearing. Therefore, the court ORDERS this matter REMANDED to the HAC for the purpose of *clarifying the administrative record as to whether or not the HAC reviewed the evidence before making a decision*. If the amended record establishes that the HAC did review the evidence, no further action is necessary. If on the other hand the record indicates that they did not review the record, then the decision of the HAC is to be vacated and the parties allowed to present argument either orally or in writing as the HAC may order and thereafter a decision is to be rendered by a majority of the HAC.

*Town of Brookline Zoning Board of Appeals v. Housing Appeals Committee, et al.*, C.A. No. 07-0697 (Norfolk Super. Ct. Jan. 18, 2008) (Emphasis added). The Committee requested that the Court reconsider its decision because, having already provided an opportunity for written rather than oral argument to the Committee members through the Presiding Officer's order, we had already fully complied with 760 CMR 56.06(7)(e)(9)<sup>6</sup> and G.L. c. 30A, § 11(7). The Court denied the request for reconsideration and remanded the matter to the Committee as follows.

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5. Such deliberation is required by 760 CMR 56.06(7)(e)(2) [formerly § 30.09(5)(b)], which states, "[i]n cases in which the presiding officer is not a member of the Committee, he or she shall participate in deliberations of the Committee, but shall not vote."

6. Formerly 760 CMR 30.09(5)(h).

Motion ... Denied 760 CMR 30.09 [now 760 CMR 56.06(7)] and G.L. ch 30 Section 11 (7) provide that if a majority of the Committee did not hear or read the evidence of the parties must be provided the opportunity to file written objections and present oral or written arguments as the Agency may determine. Brookline ZBA has not had the opportunity but it is not known whether they deserve the opportunity until the HAC reveals whether a majority of its members reviewed the evidence.

*Town of Brookline, supra*, C.A. No. 07-0697 (Mar 12, 2008).

## **II. REMAND PROCEEDING BEFORE COMMITTEE**

On remand, the Presiding Officer issued a "Proposed Decision and Report of Hearing Officer on Remand" dated April 8, 2008, and mailed it to counsel for all parties, with a cover letter stating:

Pursuant to 760 CMR [56.06(7)(e)(9) and (10)], I am enclosing the Proposed Decision and Report of Hearing Officer on Remand in the above case. In accordance with [§ 56.06(7)(e)(9)], you may submit written arguments and objections on or before April 29, 2008 for the Committee's consideration.

See attached Exhibit C.

On April 29, 2008, the Board submitted "Appellee's Objections to Proposed Decision and Report of Hearing Officer on Remand and Demand for Oral Argument." Neither the developer nor the Intervener filed an objection or other response to the Proposed Decision on Remand.

## **III. DISCUSSION**

The Committee has reviewed the Board's objections to the Proposed Decision on Remand. After deliberations with full participation again by the Presiding Officer, we find the Board's objections to be without merit and we reaffirm the previously issued decision, as amended by this decision. On remand, a review of the record makes clear that G.L. c. 30A, § 11(7) and 760 CMR 56.06(7)(e)(9) and (10) have been followed. Section 11(7) states, in pertinent part: "If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision ... shall be made only after ... an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials

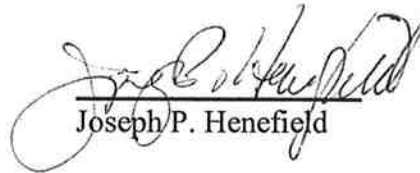
who are to render the final decision.” We concur in the Presiding Officer’s determination to permit written, rather than oral, argument to the full Committee.


With respect to the original decision, the Committee members participating have not heard or read all the evidence. However, upon receipt of a written request for a proposed decision, and after the parties submitted their post-hearing memoranda, the Presiding Officer issued a Proposed Decision and Report of Hearing Officer. At that time, rather than grant oral argument on the Proposed Decision, she notified the parties in her cover letter that they were entitled to submit “written arguments and objections” to the Committee. We reviewed the parties’ post hearing memoranda and the subsequent written arguments and objections submitted by the Board and the Intervener in connection with the original proposed decision. The Presiding Officer participated fully in our deliberations. The same procedure has been followed in connection with the remand proceeding. Therefore, the Committee has fulfilled the requirements of G.L. c. 30A, § 11(7) and 760 CMR 56.06(7)(e)(9), as well as § 56.06(7)(e)(2).

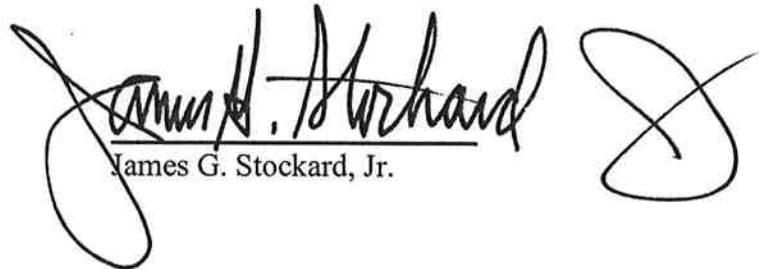
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.


Housing Appeals Committee

Dated: May 12, 2008

  
Joseph P. Henefield

  
Marion V. McEttrick

  
James G. Stockard, Jr.

  
Shelagh A. Ellman-Pearl, Presiding Officer

DEPARTMENT OF  
HOUSING &  
COMMUNITY  
DEVELOPMENT

EXHIBIT A

HOUSING APPEALS COMMITTEE

Werner Lohe, Chairman  
Shelagh A. Ellman-Pearl, Hearing Officer  
Lorraine Nessar, Clerk  
617-573-1520



Deval L. Patrick, Governor  
Timothy P. Murray, Lt. Governor  
Tina Brooks, Undersecretary

January 23, 2007

Walter C. Spiegel, Esq.  
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9 Damonmill Square, Suite 4A4  
Concord, MA 01742

Daniel C. Hill, Esq.  
Anderson & Kreiger, LLP  
One Canal Park, Suite 200  
Cambridge, MA 02461

Re: *Paragon Residential Properties, LLC v. Brookline*, No. 04-16

Dear Counsel:

Enclosed please find the Proposed Decision and Report of Hearing Officer in the above case. In accordance with 760 CMR 30.09(5)(i), you may file written arguments and objections on or before February 5, 2007 for the Committee's consideration.

Yours truly,

A handwritten signature in black ink, appearing to read "Shelagh A. Ellman-Pearl".

Shelagh A. Ellman-Pearl  
Presiding Officer



**BLATMAN, BOBROWSKI & MEAD, LLC**

ATTORNEYS AT LAW

9 Damonmill Square, Suite 4A4  
Concord, MA 01742  
Phone: 978-371-2226  
Fax: 978-371-2296

**EXHIBIT B**

**JASON R. TALERMAN, OF COUNSEL**  
Direct: 978-371-1524  
jay@bbmatlaw.com

**NEWBURYPORT OFFICE**  
44 Merrimac Street  
Newburyport, MA 01950  
Phone: 978-463-7700  
Fax: 978-463-7747

February 5, 2007

BY HAND DELIVERY

Housing Appeals Committee  
100 Cambridge Street, 3<sup>rd</sup> Floor  
Boston, MA 02114

Re: Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals  
Housing Appeals Committee, Docket No. 04-16

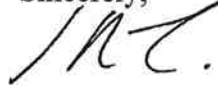
Dear Sir/Madam:

Enclosed, please find the *Appellee's Objections and Argument in Opposition to the Draft Decision of the Committee's Hearing Officer.*

Please also note my change of address.

Thank you.

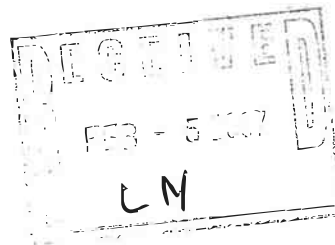
Sincerely,



Jason R. Talerman

Enc.

cc: Walter Speigel, Esq.  
Daniel Hill, Esq.  
Brookline Bd. Of Appeals  
Brookline Town Counsel



DEPARTMENT OF  
HOUSING &  
COMMUNITY  
DEVELOPMENT



Deval L. Patrick, Governor  
Timothy P. Murray, Lt. Governor  
Tina Brooks, Undersecretary

EXHIBIT C

HOUSING APPEALS COMMITTEE

Werner Lohe, Chairman  
Shelagh A. Ellman-Pearl, Hearing Officer  
Lorraine Nessar, Clerk  
617-573-1520

April 8, 2008

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Daniel C. Hill, Esq.  
Anderson & Kreiger, LLP  
One Canal Park, Suite 200  
Cambridge, MA 02461

Re: *Paragon Residential Properties, LLC v. Brookline*, No. 04-16

Dear Counsel:

Pursuant to 760 CMR 30.09(5)(h) and (i), I am enclosing the Proposed Decision and Report of Hearing Officer on Remand in the above case. In accordance with § 30.095(h), you may submit written arguments and objections on or before April 29, 2008 for the Committee's consideration.

Yours truly,

Shelagh A. Ellman-Pearl  
Presiding Officer